

## § 385.907

## 18 CFR Ch. I (4–1–10 Edition)

administrative record is always available to the Commission and will not include irrelevant or duplicative documents in the appendices.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 395, 49 FR 35357, Sept. 7, 1984; Order 416, 50 FR 15733, Apr. 22, 1985; Order 416-A, 50 FR 36054, Sept. 5, 1985]

### § 385.907 New facts and issues (Rule 907).

(a) *Raised by the petitioner.* In the answer, as provided in Rule 906(b)(2)(ii) (new facts and issues) the petitioner may request permission of the presiding officer to raise new facts or issues not raised in prior proceedings on the contested order that:

(1)(i) Are facts or issues that were not known and could not, with the exercise of due care, have been known to the petitioner at the time they would otherwise have been raised during the prior proceedings;

(ii) Are facts or issues that the petitioner was unable to raise at the time they could have been raised during the prior proceedings because of unduly restrictive time limits imposed by the Secretary; or

(iii) Are facts or issues that the petitioner was not permitted to raise in the prior proceedings due to erroneous adverse procedural rulings; and

(2) Are necessary for a full and true disclosure of the facts.

(b) *Raised by the Secretary.* In the reply under Rule 906(a)(2) (pleadings), the Secretary may request permission of the presiding officer to raise new facts or issues not raised in prior proceedings on the contested order that:

(1) Are necessary to support the Secretary's case as a result of new facts or issues raised by the petitioner under Rule 906(b)(2)(ii) (pleadings) and this section; and

(2) Are necessary for a full and true disclosure of the facts.

(c) *Raised by interveners.* In the motion to intervene under Rule 906(c)(3) (pleadings) and this section, an intervener may request permission of the presiding officer to raise new facts or issues not raised in prior proceedings on the contested order that:

(1) If the intervener did not participate in the prior proceeding, meet the

criteria of paragraphs (a)(1) and (a)(2) of this section; or

(2) If the intervener participated in the prior proceedings, are:

(i)(A) Facts or issues that were not known and could not, with the exercise of due care, have been known to the intervener at the time they would otherwise have been raised during the prior proceedings;

(B) Facts or issues that the intervener was unable to raise at the time they could have been raised during the prior proceedings because of unduly restrictive time limits imposed by the Secretary; or

(C) Facts or issues that the intervener was not permitted to raise in the prior proceedings due to erroneous adverse procedural rulings; and

(ii) Are necessary for a full and true disclosure of the facts.

(d) *Determination by the presiding officer.* The presiding officer will determine whether to grant or deny, in whole or in part, the requests of the participants to raise new facts or issues and will serve those determinations on the participants in the proceeding.

### § 385.908 Discovery (Rule 908).

(a) *By petitioner.* In the answer under Rule 906(b)(2) (pleadings), the petitioner may request permission of the presiding officer to conduct discovery, where such discovery:

(1) Relates to new facts or issues raised in accordance with Rule 907(a) (new facts and issues); or

(2)(i) Was not permitted in the prior proceedings on the contested order due to erroneous adverse procedural rulings; and

(ii) Is necessary for a full and true disclosure of the facts.

(b) *By the Secretary.* In the reply under Rule 906(a)(2) (pleadings), the Secretary may request permission of the presiding officer to conduct discovery where such discovery relates to new facts or issues raised in accordance with Rule 907(b) (new facts and issues).

(c) *By interveners.* In a motion to intervene under Rule 906(c)(8) (pleadings) an intervener may request permission of the presiding officer to conduct discovery where such discovery:

(1) Relates to new facts or issues raised in accordance with Rule 907(c) (new facts and issues); or

(2) If the intervenor participated in the prior proceedings,

(i) Such discovery was not permitted in prior proceedings on the contested order due to erroneous adverse procedural rulings; and

(ii) Such discovery is necessary for a full and true disclosure of the facts.

(d) *Determinations by the presiding officer.* The presiding officer will determine whether to grant or deny, in whole or in part, the requests of the participants for discovery and will set a time limit within which discovery must be conducted.

(e) *Interrogatories.* In addition to discovery devices applicable to this subpart under other subparts of this part, participants may conduct discovery by means of written interrogatories under conditions determined by the presiding officer.

#### § 385.909 Hearing (Rule 909).

(a) Participant may file, within 20 days after the commencement of the proceeding under Rule 904 (Commencement of proceeding), a request for a hearing or a motion for the opportunity for cross-examination including the reasons why cross-examination is necessary for a full and true disclosure of the facts.

(b) If a participant has filed a request for a hearing, the presiding officer will grant the request for a hearing. The hearing will include an opportunity for the submission of oral or documentary evidence and oral arguments.

(c) The presiding officer may at any time, convene a hearing.

(d) As soon as practicable after receiving a request for hearing under paragraph (a) of this section or after determination that a hearing will be held under paragraph (c) of this section, the presiding officer will give notice to the participants of the time and place of the hearing.

(e) The presiding officer will determine the issues to be resolved in the proceeding, may specify the time available for oral argument, and will give notice thereof to the participants. The presiding officer may require additional information from the partici-

pants, and may convene a prehearing conference for the purpose of determining the issues or the nature of the proceeding to be held.

(f) If at any time prior to the certification of the record by the presiding officer under Rule 913 (Certification of the record), with or without a motion of a participant, the presiding officer determines that it is necessary for a full and true disclosure of the facts, the presiding officer may order that the participants be afforded the opportunity for cross-examination on any facts or issues raised in the proceeding.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 416, 50 FR 15733, Apr. 22, 1985; Order 416-A, 50 FR 36054, Sept. 5, 1985]

#### § 385.910 Conduct of the hearing (Rule 910).

The presiding officer is responsible for conduct of the hearing, including the order of procedure.

#### § 385.911 Burden of proof (Rule 911).

(a) The Secretary has the burden of going forward and must sustain the burden of proof with respect to disputed elements of affirmative case of the Secretary.

(b) The Commission order will be based on a preponderance of the evidence.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 416, 50 FR 15733, Apr. 22, 1985]

#### § 385.912 Proposed findings of fact, conclusions of law, and comments (Rule 912).

(a) Within 10 days after the conclusion of the hearing, or, if no hearing is held, within 20 days after the filing of the petitioner's brief under Rule 906(b)(3) (pleadings), a participant may file with the Secretary of the Commission for the presiding officer, and serve upon the other participants proposed findings of fact and conclusions of law, comments in support thereof and any objections with respect to procedural rulings of the presiding officer.

(b) Within 10 days after the filing of proposed findings of fact and conclusions of law under paragraph (a) of this section, a participant may file, and must serve on other participants, a reply thereto.